No. 15,230

IN THE

United States Court of Appeals

For the Ninth Circuit

MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a corporation, GIRARD INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA, a corporation, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a corporation, QUEEN INSURANCE COMPANY OF AMERICA, a corporation, and Does I to X, inclusive,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Chief Judge and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

This cause was determined in this Court on August 15, 1957. The opinion was written by Circuit Judge Hamley. There were associated with him Circuit Judge Lemmon and Circuit Judge Chambers.

The judgment reversed a judgment, in part, in an action on fire insurance contracts, in favor of the four defendants, and entered on written findings of fact of the trial Court. On appeal Appellant questioned the correctness of the findings of fact of the trial Court that Truman Stivers was an agent for Appellant, and that Appellant had not complied with the occupancy provisions of his insurance contract, on the grounds that under the evidence Truman Stivers was not an agent of Appellant and that Appellant either complied with the occupancy provisions of the policy, or with the occupancy requirement as alleged by Appellant to maintain a watchman on the premises at all times.

Appellees and petitioners National American Insurance Company (National) and Girard Insurance Company of Philadelphia (Girard) ask for a rehearing and re-consideration of their claim that written findings of fact in their favor are supported by the evidence, and that this Court pass upon and settle the important questions of federal practice which the reversal of the trial Court presents:

(1) The proper function of this Court on appeal from a judgment to review the action of the trial Court in making written findings of fact upon conflicting evidence, determining the credibility of witnesses and weighing the evidence, where as here the trial Court properly performed its function, and (2) the consideration which should move this Court, the guides to its action, the limit of its function in re-

viewing written findings of fact and credibility of witnesses where as here a conflict in evidence exists.

It is submitted, with deference, the questions presented are not clearly or correctly passed upon and that the questions, warrant a re-hearing by this Court.

In support of this application, petitioners National and Girard respectfully show:

I.

SUMMARY STATEMENT OF THE CASE.

For purposes of this petition the facts out of which this litigation arose are stated briefly:

Appellant was the owner of an orange packing plant in Tulare County, California, consisting of a packing house and loading platform, equipment, stock including field boxes and supplies, bunk house, and storage building. Effective December 1, 1952, the four Appellees insured Appellant against fire loss to the plant in the aggregate amount of $40,000 for three years.

On October 13, 1954, fire in the packing house destroyed the insured property except the bunk house. Appellant filed Proofs of Loss in excess of $40,000. Each Appellee rejected the Proof of Loss received by it on the ground that Appellant had not complied with the occupancy provisions of its policy. Appellant denied such charge and claimed that each Appellee waived the occupancy provisions of the policy. After a non-jury trial, the trial Court entered judgment for Appellees.

No motion for new trial was made by Appellant.

II.

CONSIDERATIONS UNDERLYING THIS PETITION.

The opinion of this Court was unanimous that Appellant did not meet the minimum requirement for occupancy under the policies of insurance and the California law:

> "While this seems to be the purport of the California law, it is unnecessary for us to decide whether occupancy of a building for a purpose other than its designed or described purpose inevitably suspends the policy. The decisions reviewed above teach, at the very least, that buildings designed for human occupancy, whatever the purpose, are not 'occupied' unless (1) authorized persons are physically present therein for a reasonable portion of the period during which occupancy is required, or (2) if such persons are not present therein during the required period of occupancy, their absence is temporary in nature and consistent with the use of the building for its designed purpose. *This minimum requirement for occupancy was not met in this case.*" (Emphasis supplied.)

Yet, as to these Appellees, this Court reversed the trial Court on the grounds, stated briefly: that under the evidence Truman Stivers was an agent of Appellees, only; according to testimony of Truman Stivers, he advised Appellant that since the packing plant would not be operated as a plant, he should have someone living on the property and the Morris family living in a house trailer constituted occupancy and reasonable surveillance. In effect, by its opinion, this

Court determined for itself questions of fact contrary to conflicting evidence which was before the trial Court.

In findings of fact at Paragraphs XV and XVIII the trial Court found that the packing plant was not occupied as contemplated by Appellant and Appellees:

> "It is true that said premises were not occupied as contemplated by plaintiff and National, Girard, State or Queen under said insurance contracts for more than ten (10) consecutive months prior to or at the time of such fire." (Par. XVIII) (93*)
>
> "It is true that said citrus fruit packing house was unoccupied for more than ten (10) consecutive months prior to said fire and at the time of said fire the insurance under each of said insurance contracts was suspended by reason of such unoccupancy in excess of ten (10) consecutive months." (Par. XV) (92)

because, in the words of the trial court:

> "The factual basis for this argument is that Truman Stivers knew that the citrus plant was not operating and informed the plaintiff 'that unless he would keep somebody on the property his insurance would be in jeopardy * * * and he should try and keep somebody in there living on the premises.' (Reporter's Transcript p. 99) Relying on this statement and to keep the insurance effective the plaintiff obtained a family, Mr. and Mrs. Morris and their son, to live in a trailer alongside the plant. This was not living on the insured premises. (See Rossini v. St. Paul Fire & Marine Insurance Co., 188 P. 564; also Words

*Refers to Transcript page.

& Phrases, Permanent Edition, Vol. 33, p. 353.)
"Assuming without deciding that the agent, Truman Stivers, had authority, either actual or ostensible, as to two of the policies to permit this substitution of conditions without having a written endorsement attached to the policy, this court finds that the substituted condition was not complied with. From the testimony at the time of trial there is no doubt that the requirement of having someone living on the premises was not fulfilled. The trailer was at least 50 feet from the plant and neither Mr. nor Mrs. Morris had a key to any of the buildings. In addition, Mrs. Morris testified that on the day of the fire no one was present on the premises because they were all at work, which was their customary practice.

"This is not the type of case where a party relied on an agent's statements waiving a condition of an insurance policy. The plaintiff was apprised of the fact that his insurance would 'be in jeopardy' unless a stated condition was complied with, and from all the facts there is no doubt that the requirement was not met. The premises were not occupied as contemplated by the parties."

It is pointed out, with deference, first, that the opinion of this Court is contradictory when it stated "there is no testimony to indicate that Appellant was advised to . . . direct one of the family to be present at the plant at all times"; while, at another point, the Court stated: "Appellant's employee participated in this conversation stated, on cross-examination, that what Truman's employee had said was that there would have to be a 'watchman' on the property at all times."

Second, the Court has overlooked that there was testimony by Appellant in which he admitted that he personally understood that he was to have someone on the property at all times, and he so instructed his foreman:

> "Q. (By Mr. Castro). Now, did you tell Mr. Morris or his wife or his boy that they had to spend any particular hours at the packing plant?
>
> A. No, I didn't talk to them. My cousin was our foreman up there.
>
> Q. You didn't personally?
>
> A. He made the arrangements with them and *I told him that there had to be someone on the property all the time, which he said either one of this family was there at all times.*
>
> Q. *You told your foreman that there had to be someone on the property at all times?*
>
> A. Yes." (125) (Emphasis supplied.)

In his complaint, presumably after consultation between Appellant with his counsel, Appellant expressly recognized the requirement of a watchman at all times when he affirmatively alleged that Appellees "consented that the plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond 10 consecutive months; that pursuant to said agreement of said" . . . Appellees . . . "the plaintiff hired and maintained a watchman on said premises at all times after the issuance of the policy and until said property was destroyed by fire." (7, 12, 17 and 21).

Likewise, Berenice Zimmerman, whose duties as office manager for Appellant included insurance, admitted:

"Q. (By Mr. Castro). Isn't it a fact that what Mrs. Woods told you was that there would have to be a watchman on the property at all times?

A. Yes. She told me—that was the word she used, watchman at all times.

Q. Then did you tell that to Mr. Morgan A. Stivers, that there would have to be a watchman on the property at all times?

A. Mr. Stivers read my note, sir, and we discussed it.

Q. Then did you call Mrs. Woods back and tell her Mr. Stivers would have a watchman at all times?

A. I called her back and told her he would meet whatever term were necessary to be met in order for the insurance to be put in force.

Q. And did you have in mind at that time what she had told you, that there would have to be a watchman there at all times?

A. I beg your pardon?

Mr. Castro. Will you read the question?"

(Question read.)

"The Witness. I dont quite understand. Did I have in mind?

Q. (By Mr. Castro). You stated that you—you testified that Mr. Stivers had told you that he would comply with all the terms of the policy.

A. Yes. That was his decision.

Q. Was that his decision after you told him there would have to be a watchman there at all times?

A. There would have to be someone on the property at all times.

Q. Did you use the term 'watchman'?

A. To be very honest, I couldn't say. It has been three years since I had the conversation.

Q. Did you write the words down?

A. I wrote the word 'Watchman', yes.

Q. I show you this memorandum book which you have.

A. I am familiar with that.

Q. You have refreshed your memory from it and it uses the term 'watchman', does it not?

A. Yes.

Q. That term 'watchman' is in your own handwriting?

A. That is true.

Q. Then that is what you told Mr. Morgan A. Stivers, a watchman would be required, and so on?

A. Yes. It is in the notes." (149-150)

Contrary to the opinion of the Court that "we find nothing in the record to indicate that Truman's advice to Appellant required that the family live in one of the buildings," Appellant on direct examination, told the trial Court that they had to have someone living at the specific part of the property known as the "packing house":

"Q. (By Mr. Stump). At the time of this conversation, Mr. Stivers—I am sorry but I can't hear you, sir, when you answer. If you will tell us what this conversation was.

A. Well, the best I recall it was about the—we weren't going to operate the packing house any more and I told him of course that we didn't know whether we would ever operate it any more and I believe he said at that time, 'You will have

to keep someone on the property if it is not in operation,' which we did have someone living on the property and had them there all the time.

Q. You thereafter had someone living on the property, is that what you said?

A. Yes.

The Court. Which part of the property?

The Witness. Well, living *at the packing house.* He told me that for our insurance to be in force that there had to be someone living on the property." (118, 119) (Emphasis supplied.)

Also, Truman Stivers testified that he informed Appellant that he would have to keep someone in the packing house:

"Q. And had you had any occasion after writing the first policies and between that time and renewing the second policies to discuss with Morgan Stivers or any representative of his, the fact that this plant was not occupied?

A. Yes. I am inclined to say quite often on business of my own. We have ranches there and I would make it a point to drive by the packing house to see that things were in order and on occasion I found that the people that were living in the plant, occupying it, had moved and I would bring this to the attention of Morgan Stivers and then he would see that somebody *would be located in the property.*

Q. And that was prior to issuing these second policies, is that right?

A. Yes, sir.

Q. And you knew for several years prior to issuing the second policies, the policies in 1952, that the plant had not been operated as such?

A. I knew it for more than a year, yes.

Q. And did you at any time have a conversation with Mr. Stivers regarding the necessity for having someone living on the premises in lieu of occupancy?

A. Yes, I did.

Q. Can you recall what you told Mr. Stivers at that time?

A. The exact words, no, but the conversation was to the effect that unless he would keep somebody on the property his insurance would be in jeopardy—if it were vacant for a certain length of time he would be putting his insurance in jeopardy and he should try and *keep somebody in there living on the premises.*" (p. 180) (Emphasis supplied.)

So there was substantial evidence for the trial Court's finding that Appellant was directed to have a watchman on the property at all times, and in the packing house. The trial Court in the exercise of its primary function of findings of fact, weighed conflicting evidence and determined the credibility of witnesses and found in favor of the conclusion that a watchman was required at all times.

The significance of the admitted absence of the Morris family daily, is demonstrated by these facts:

The insured premises was in an unprotected fire area (231) along a railroad right of way, where strangers sought entrance during the day as well as at night (222).

The fire occurred at the packing house about 12 noon, and burned until it was discovered by a neighbor,

Edward L. Myers, who was working 2 to 3 miles from the packing plant (201), when the Morris family, including their 16 year old son, were away working in another packing house at Porterville, California (226). For the month and half they lived in the trailer, the entire Morris family were away from the packing plant from 6 or 7 A.M. to 3 to 5 P.M. daily (202), and had not entered the packing house.

It is reasonable to point out that if someone had been at the packing house, the fire might not have started, or it would have been discovered early enough to control its spread or protect the insured property and reduce the amount of damage.

So, again, there was substantial evidence for the trial Court's findings that under the hazardous circumstances of this risk, Appellant did not occupy the premises as contemplated by Appellees and Appellant.

Finally, the burden was upon Appellant to prove the occupancy as required by the policy, or as allegedly modified, and there was no burden upon Appellees to prove unoccupancy.

Rizzutto v. Nat'l Reserve Ins. Co. (1949), 92 C.A. 2d 143, 206 P. 2d 431.

The trial Court found that Truman Stivers was acting as a dual agent of Appellant and Appellees (Par. II (d), IV, V, VI and VII, 86-89).

The opinion of this Court was that such findings could not be supported by the evidence in that when Appellant admitted that Truman Stivers was his agent for handling his insurance "Appellant did not

mean that he accepted Truman Stivers as his agent in that the acts or omissions of Truman Stivers would bind Appellant, but that he was referring to Truman Stivers "in the same sense as he would have said 'our newsboy,' 'our grocer,' or 'our doctor'." The testimony was:

"Q. Mr. Stump, your nephew is Truman B. Stivers?

A. Yes.

Q. And he became an insurance agent and went into the insurance business, did he, eventually?

A. Yes, he did and he wrote practically all of our insurance for several years.

Q. And he acted as an agent for you, did he, in taking care of your insurance?

A. Yes.

Q. And that is true up to the time of this fire and up to the present time, I assume?

A. Yes."

Appellees propounded the interrogatories in the sole specific sense that Truman Stivers as agent of Appellant was authorized to bind Appellant by his acts or omissions. There was neither any objection to either the interrogatory or a motion to strike the answer, nor was any testimony offered by Appellant on redirect examination or otherwise, that he was referring to Truman Stivers in the sense alleged by this Court.

III.

IN THIS CASE, THE COURT HAS ERRONEOUSLY RETRIED ISSUES OF FACT, REJUDGED THE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE EVIDENCE.

While it is conceded under Rule 52 (a) of the Federal Rules of Civil Procedure this Court has a right to reverse the judgment of a trial Court when a finding of fact is "clearly erroneous," it is equally true that the trial Court is the trier of the facts, and the judge of the credibility of the witnesses and of the weight of the evidence. As expressed in *Noland v. Buffalo Ins. Co.* (1950 Cir. 8th) 181 F. 2d 735, 738:

> "(2) The District Court was the trier of the facts, and the judge of the credibility of the witnesses and of the weight of the evidence. The court was not compelled to believe evidence which to it seemed unreasonable or improbable, or to accept as true the uncorroborated evidence (even though uncontradicted) of the insured and his wife, who were interested witnesses. Rasmussen v. Gresley, 8 Cir., 77 F. 2d 252, 254; Yutterman v. Sternberg, 8 Cir., 86 F. 2d 321, 324, 111 A.L. R. 736; Elzig v. Gudwangen, 8 Cir., 91 F. 2d 434, 440-444; Hoyt v. Clancey, 8 Cir., 180 F. 2d 152, 155.
>
> (3) This Court will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. Cleo Syrup Corporation v. Coca-Cola Co., 8 Cir., 139 F. 2d 416, 417-418 150 A.L.R. 1056, and cases cited; Pendergrass v. New York Life Insurance Co., 8 Cir., 181 F. 2d 136. Under Rule 52 (a) of the Rules of Civil Procedure for the United States District Courts, 28

U.S.C.A., 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' A reversal of this case would be virtually equivalent to instructing the trial court to accept as true and reliable, evidence which it evidently did not regard as either credible or convincing.

(4, 5) This is not a case in which the plaintiff was entitled to judgment as a matter of law. Had the case been tried to a jury, a verdict for the defendant on the fact issues would have been conclusive. We think the finding of the District Court that the insured had failed to sustain the burden of proving the amount of his loss is conclusive, whether correct or incorrect. See Cleo Syrup Corporation v. Coca-Cola Co., supra, page 417 of 139 F. 2d; Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 695, 69 S.Ct. 1457. Appellate courts should be slow to impute to trial courts a disregard of their duties and responsibilities or a want of diligence or perspicacity in evaluating the credibility of witnesses and the weight of evidence."

Lincoln Life Ins. Co. v. Mathison (1945 Cir. 9th) 150 Fed. 2d 292, 295;

Gates v. Gen. Cas. Co. of America (1941 Cir. 9th) 120 Fed. 2d 925, 927.

A finding of fact is not clearly erroneous "unless it is without adequate evidentiary support or results from a misconception or misapplication of the law."

Hudspeth v. Esso Std. Oil Co. (1948 Cir. 8th) 170 Fed. 2d 418, 420.

It is well established that words of an insurance contract are to be construed in their ordinary sense.

Mass. Mut. Life Ins. Co. v. Pistolesi (1947 Cir. 9th) 160 Fed. 2d 668, 669—term "contusion";

American Motorist Ins. Co. v. Moses (1952) 111 C.A. 2d 344, 347; 244 P. 2d 760—term "truckman."

and even "the fact that the bargain is a hard one will not deprive it of validity."

Standard Acc. Ins. Co. v. Unget (1952 Cir. 9th) 197 Fed. 2d 104;

Greenberg v. Continental Cas. Co. (1938) 24 C.A. 2d 506, 514; 75 P. 2d 644.

The question of whether terms were used in their ordinary, every day sense, such as a "watchman" being a person "set to watch or guard a building"; or an "agent" in the sense that the person has the power to bind or act for a principal, are questions of fact, which the trial Court resolved against Appellant.

The question of whether a watchman maintained a "reasonable surveillance" as stated by the opinion was a question of fact on which the trial Court made a contrary finding.

See:

Kelley v. Hodge Transportation System (1925) 197 Cal. 598, 608; 242 P. 76—meaning of reasonable man;

Kenniff v. Caulfield (1903) 140 Cal. 34, 41; 73 P. 803, 805—meaning of reasonable search;

Richmond v. Sacramento Valley Railroad Co. (1861) 18 Cal. 351—meaning of due care;

75 Corpus Juris Secundum 634-638, note 90, which lists many examples of the term "reasonable" reiterating it is a question of fact.

What Appellant meant when he admitted Truman Stivers took care of his insurance as Appellant's agent involved a question of fact, which the trial Court resolved against Appellant.

Rankin v. Brown (1933) 131 C.A. 137, 20 P. 2d 954.

While the opinion of the Court refers at length and appears to accept the testimony of Truman Stivers, Appellant and Ruby Morris, as true, the trial Court was the judge of the credibility of Truman Stivers, Appellant and Ruby Morris, whose testimony conflicted with the quoted and other testimony before the trial Court. It was the primary function of the trial Court to weigh the testimony that conflicted with Truman Stivers, Appellant and Morris. The trial Court was not compelled to believe the testimony of any of them but could, and did, accept the other testimony which has been quoted in this petition.

Neither was the decision of the trial Court without adequate evidentiary support nor did it result from a misapplication or misconception of the law. This Court agreed that the "minimum requirement for occupancy" under the printed policy and the law of California was not met by Appellant. Up to that point, this Court saw "eye to eye" with the trial Court.

Thereafter, the opinion of this Court does not point out any rule of law that was misconceived or misapplied by the trial Court, and the experienced trial Court was well aware of and properly applied the law against Appellant.

The trial Court accepted the use of the terms "watchman" and "agent" in their every day sense, and determined as a fact, on the testimony of such witnesses as Bernice Zimmerman, Florence Woods Dines and Edward Myers, the admissions of Appellant in his complaint and from the witness stand that Appellant did not occupy the packing plant as contemplated by the Appellees and Appellant.

IV.

CONCLUSION.

It is respectfully submitted that the trial Court properly exercised its function as the trier of the facts, and the judge of the credibility of the witnesses and the weight of the evidence. While this Court, erroneously, has retried issues of fact, the weight of the evidence and substituted its judgment with respect to such issues for that of the trial Court. The action of this Court in exceeding its function has resulted in substantial prejudice, which can and should be corrected.

Dated, San Francisco, California,
September 10, 1957.

Respectfully submitted,
AUGUSTUS CASTRO,
Attorney for Appellees and Petitioners.

CERTIFICATE

I certify that I am the attorney for Defendants and Appellees National American Insurance Company and Girard Insurance Company of Philadelphia in charge of the above entitled cause in their behalf. That I have prepared the foregoing petition for re-hearing, that in my judgment it is well founded and it is not interposed for delay.

Dated, San Francisco, California,
September 10, 1957.

AUGUSTUS CASTRO,
Attorney for Appellees
and Petitioners.